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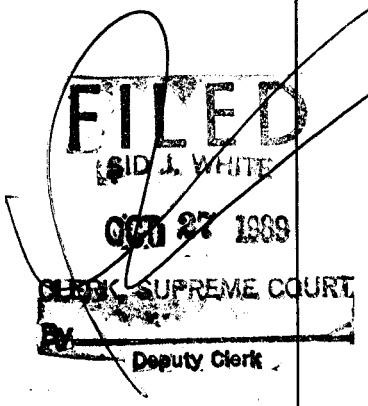
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,800



HONORABLE MARY ANN MacKENZIE,
Judge of the Circuit Court of
Florida, Eleventh Judicial
Circuit,

Petitioner,

vs.

ARTHUR BREAKSTONE, et al.,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This cause is before this Honorable Court for review pursuant to certification by the Third District Court of Appeal that the decision of that court passed upon the following question of great public importance:

> IS A TRIAL JUDGE REQUIRED TO DISQUALIFY HERSELF ON MOTION WHERE COUNSEL FOR A LITIGANT HAS GIVEN A $500 CAMPAIGN CONTRIBUTION TO THE POLITICAL CAMPAIGN OF THE TRIAL JUDGE'S SPOUSE?

This case was consolidated for en banc consideration in the District Court with another case involving the same question. One majority opinion was written for the District Court for both cases and two dissenting opinions were written for both cases. The other case is before this Honorable Court for review under the style:

> Hon. Mary Ann Mackenzie v.
> Super Kids Bargain Stores, Inc.
> Case No. 74,798

The decision and opinion of the Third District Court to be reviewed with the dissenting opinions is included in the appendix bound with this brief but separated by appropriate divider and tab. It is published at 14 Fla.Law Weekly 2223.

The following facts are correctly stated in the decision to be reviewed.

The BREAKSTONE case was before the District Court upon petition for writ of prohibition to reverse a ruling by the respondent circuit judge denying a motion for disqualification. The motion was filed by the defendant, alleging that counsel for the plaintiff had contributed $500 to the campaign

of the judge's husband who was a candidate for election to the office of judge. The judge denied the motion, but stated:

> I cannot address your motion as far as the truth or misinformation that you may have or not have or anything like that.
>
> But I will state for the record that I kept absolutely clear of my husband's campaign, had nothing to do with it whatsoever. Couldn't go to a judicial luncheon - I went to one and it was followed all over by The Miami Herald, and that's the last time I went to anything. And who donated to his campaign and who did not donate to his campaign, I don't know. I have looked at his records. So in no way could I be prejudiced.

Later in the hearing, the judge expressed frustration at not being involved in her husband's campaign and expressed the view that he would have won if she had participated. A subsequent motion to disqualify was made claiming that the judge had improperly commented upon the first motion. That motion was denied.

A panel of the District Court held that the first motion to disqualify was legally sufficient and should have been granted. This decision was upheld on en banc rehearing, but the decision was certified as passing upon a question of great public importance as stated above. Timely notice of discretionary review was filed.

SUMMARY OF ARGUMENT

The law presumes that a judge is not prejudiced. Such presumption may be overcome by a motion for disqualification which sets forth an actual foundation of facts sufficient to create a well-founded fear of bias. It is not enough for a party to merely proclaim a subjective fear of bias. Whether the motion sets forth facts which are legally sufficient to demonstrate a reasonable and objective fear of bias or prejudice is a question of law to be decided by the trial judge. If the motion to disqualify is legally insufficient, the trial judge has a duty to deny the motion and to continue to perform the duties of presiding judge in the case.

A determination that the facts presented in the Motions for Disqualification in the instant cases are legally sufficient to require the Motions to be granted, would contravene existing Florida law. Friendship between the trial judge and an attorney for a party or political support of the trial judge by an attorney for a party, standing alone, is not sufficient to compel disqualification under Florida law.

Even though this Honorable Court is not restrained by existing precedent, it would not be wise to adopt the holding of the District Court decision. Such a result would prevent lawyers from supporting qualified candidates for selection as judges, since they would then be unable to appear before such qualified candidates when they become judges. Half of the contributions to judges throughout the state come from lawyers, and serious administrative difficulties would result

from the widespread reassignment of cases and judges that would be necessary. Florida law prohibits contributions to trial judge's campaigns in an amount greater than $1,000, and it should not be presumed that the integrity of the trial judge can be purchased for $1,000.

Apart from the issue of the campaign contribution there is no other basis to compel disqualification of the respondent judge in this case. Respondent did not dispute the facts alleged in the disqualification motion nor otherwise impart an adversarial atmosphere to the proceeding.

ARGUMENT

I.

THE MOTION TO DISQUALIFY THE TRIAL JUDGE IN THE INSTANT CASE WAS LEGALLY INSUFFICIENT AS A MATTER OF LAW AND ANY DETERMINATION THAT MOTION SHOULD BE GRANTED CONTRAVENES ESTABLISHED FLORIDA LAW

It is a well recognized maxim of appellate review that any ruling of a trial court enjoys a presumption of correctness; similarly, the law recognizes a presumption that a judge is not biased. 48A C.J.S. Judges §108, text at nn. 33-5. In Dragovich v. State, 492 So.2d 350, 353 (Fla. 1986), this Honorable Court stated:

> We also hold here that without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient. There has been no such showing sub judice that appellant would not receive a fair trial before this judge. Without some other factual basis than was

> presented in these affidavits, it must be presumed that the trial judges of this state will comply with the law.

Similarly, in McDermott v. Grossman, 429 So.2d 393 (Fla. 3d DCA 1983), the court held that where an attorney had opposed the appointment of a trial judge to an appellate court, it would be presumed that the trial court would thereafter rule impartially in any action in which that attorney appeared before that judge. (The Court went on to hold that the presumption was overcome by a showing that the trial judge thereafter subjected the attorney to a "tirade".)

It is well settled that the mere allegation or proclamation of a fear of prejudice is legally insufficient to compel the disqualification of a trial judge. Wilson v. Renfroe, 91 So.2d 857, 860 (Fla. 1956); City of Palatka v. Frederick, 128 Fla. 366, 174 So. 826, 828-9 (1937). The facts set forth as reasons for an opinion that a judge is prejudiced must be reasonably sufficient to support a well-founded fear of prejudice. Fisher v. Knuck, 497 So.2d 240, 242 (Fla. 1986). It is clearly the duty of a judge to deny a legally insufficient motion to disqualify and to continue to discharge his judicial functions in the cause. In State ex rel. v. Cannon, 163 So.2d 535, 537 (Fla. 3d DCA 1964), the Third District Court stated the rule succinctly:

> While it is the duty of a judge to effect his disqualification when the application is legally sufficient, it is equally the duty of a challenged judge to deny the application if the affidavits submitted are legally insufficient.

Whether the application or motion for disqualification sets forth sufficient facts to support a reasonable objective fear of prejudice so as to make the motion legally sufficient presents a pure question of law. In City of Palatka v. Frederick, supra, 174 So. at 829, this Honorable Court quoted State ex rel. Brian v. Albritton, 114 Fla. 725, 154 So. 830 (1934), as follows:

> . . . Where the challenged judge has made an order finding the application legally insufficient to require that he recuse himself, this Court will refuse the drastic remedy of a permanent writ of prohibition where, upon a fair consideration of the legal effect of the allegations set up to show the alleged disqualification of the judge on account of prejudice, it does not clearly appear that the alleged disqualifying causes contemplated by statute exist as a matter of law considering the legal effect of the substantial allegations of the petition as a whole.
>
> The law imposes on a circuit judge the duty to hear and determine all cases properly brought before him for his judicial consideration. This duty he must perform whether he wishes to do so or not, . . .

The Motion for Disqualification in the instant case was insufficient as a matter of law under existing Florida law. This motion showed only that an attorney representing a party to the cause had made a financial contribution of $500 to the judicial election campaign of the judge's husband. Had the Motion shown that the contribution had been made to the election campaign of the judge herself, it would have still been legally insufficient.

In Ervin v. Collins, 85 So.2d 833 (Fla. 1956), the governor was a party in an individual capacity to a proceeding in the Florida Supreme Court. His adversary made a motion for disqualification of certain justices in which it was alleged that the family of one of the justices and the governor's family were close personal friends and that two other justices had been appointed by the governor and that the justices were political as well as personal friends of the governor. It was determined that these allegations were not sufficient to constitute a legal basis for disqualification and none of the justices were disqualified or recused. Citing Ervin v. Collins, it was held by another court that a motion for disqualification filed by a plaintiff was insufficient which stated only that the plaintiff and his attorney had campaigned for one candidate for judicial election, that said candidate was one of the plaintiff's attorneys, that the attorneys for the defendant had campaigned for the candidate who had defeated the candidate supported by plaintiff and his attorneys, and that said successful candidate supported by defendant's attorneys was the trial judge who was the subject of the disqualification motion. Raybon v. Burnette, 135 So.2d 228 (Fla. 2d DCA 1962). In McDermott v. Grossman, supra, the Third District Court indicated in dictum that where an attorney opposed the appointment of a trial judge to an appellate court the trial judge would be presumed to be impartial in subsequent cases involving that attorney. See also In re Estate of Carlton, 378 So.2d 1212, 1217-20 (Fla. 1980).

The panel decision in BREAKSTONE cited Caleffe v. Vitale, 488 So.2d 627 (Fla. 4th DCA 1986), in support of the holding of the panel. The same court that decided Caleffe subsequently stated that Caleffe should be limited to its facts which were that the trial judge presided over a case in which one of the attorneys was the campaign manager for the trial judge's ongoing reelection campaign and had directly communicated with the judge about the case. In discussing the facts of the later case the court stated (Marexcelso Compania Naviera v. Florida National Bank, 533 So.2d 805, 807 (Fla. 4th DCA 1988)):

> In our view, these facts do not rise to the level of a specific and substantial political relationship such as was expressly disapproved of in Caleffe. Rather these facts exhibit the type of endorsements and financial support that lawyers are generally encouraged to give judicial candidates.

Although it is by no means controlling precedent, in view of the importance of the issue, we have attached in the appendix hereto as an appendix an opinion of the Committee on Standards of Conduct Governing Judges dated May 15, 1978 (No. 78-7) in which the Committee responded to a series of questions from a judge and in addressing the fifth question stated:

> The participating members of the Committee are unanimously of the view that that query is answered in the negative, viz: It is not necessary that a judge recuse himself in any case in which a participating attorney has contributed time or money to the judge's campaign.

The aforesaid question and answer appear on the last page of the opinion.

The authorities cited by Judge Nesbitt in his dissenting opinion below, when compared with the majority opinion, reveals clearly that the decided cases throughout the United States overwhelmingly favor our position. Florida law, until now, has been squarely in line with this national weight of authority.

II.

IT WOULD BE UNWISE TO ESTABLISH ANY RULE OF LAW WHICH WOULD OPERATE TO DISQUALIFY A TRIAL JUDGE FROM PRESIDING IN AN ACTION SOLELY BECAUSE ONE OF THE PARTIES WAS REPRESENTED BY AN ATTORNEY WHO HAD MADE A FINANCIAL CONTRIBUTION TO THE ELECTION OF THE JUDGE.

It is clear that the decision below would establish a rule of law which would operate to disqualify a trial judge from presiding in an action solely because one of the parties was represented by an attorney who had made a financial contribution to the election of the judge. Such a rule is unwise and should not be adopted by this Honorable Court.

Were such a rule to obtain, attorneys would be effectively excluded from the process of supporting the election or appointment of judges. Attorneys would not support the selection of highly qualified judges if they were thereby prevented from practicing before highly qualified judges. Yet respectable authority encourages participation by attorneys in such activity. In a report sponsored, inter alia, by the American Bar Association and the American Judicature Society,

as quoted in Raybon v. Burnette, 135 So.2d 228, 230 (Fla. 2d DCA 1961), the following appears:

> In order to make the existing state election systems work (whether the state elects or appoints its judiciary) the informed opinion of the members of the bar as to the qualifications of judicial candidates should be brought to the attention of the voters. This should be more than a mere poll of the relative popularity of the various candidates among the members of the bar.
>
> The bar should not be content with the mere announcement of its recommendations. It should campaign actively in support of its position for or against judicial candidates. . . .

The view that judges should be disqualified from presiding in cases in which an attorney has appeared who contributed to the judge's election has not been greeted with universal enthusiasm. In Rocha v. Ahmad, 662 S.W.2d 77 (Tex. Ct. App. 4th Dist.), the court was faced with an application to disqualify two of its justices based upon financial political contributions by an attorney of record. The court concluded that disqualification was not required by Cannon 2 of the Code of Judicial Conduct which requires a judge to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. In so holding, the court stated (662 S.W.2d at 78):

> It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to

> staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

There can be little doubt that were the decision below to become law throughout the state, serious problems within the administration of justice would be created, at least in the short term. It has been disclosed that in 1982, in Florida, half of the contributors to judicial campaigns were attorneys who gave half of the money contributed. One circuit judge won election in 1980 in Dade County with 275 contributors of whom 96 percent were attorneys. Note, "Disqualifying Elected Judges from Cases Involving Campaign Contributors" 40 Stan.L. Rev. 449, 458-9 (Jan. 1988). Thus, if the decision below becomes law, there would doubtless need to be a widespread reassignment of cases, initially, due to the number of attorneys who have contributed to past judicial campaigns of sitting judges who are presiding over pending cases wherein such attorneys are counsel of record. It may be that smaller counties with few judges would require temporary transfer of judges from other parts of the state to dispose of all the cases where local lawyers have contributed to local judges.

The decision below would generate a host of additional questions. How large a contribution is necessary to render it "substantial" and thereby coerce recusal? Is there a limit on

the length of time that must have elapsed between the contribution and the motion for disqualification? Would involvement in a judicial campaign apart from financial contribution trigger coerced recusal? Would the rule apply to substantial contributions to appointment of judges as well as election? (We submit that, in fairness, this question should be answered in the affirmative.) These questions would be a fruitful source of interlocutory extraordinary writ litigation.

While we do not agree with everything stated therein, the above-cited note at 40 Stan.L.Rev. 449 represents a remarkably comprehensive and insightful analysis of the implications involved in the adoption of a rule such as that announced by the BREAKSTONE panel decision. The author is clearly no troglodyte or rigid defender of the status quo; rather, the tone of the note reflects a sincere concern for ethics and due process. The commentator recommends that an upper limit be placed upon contributions to judicial elections, and that only such a contribution by an attorney which exceeds the limit would compel the disqualification of a judge whose campaign received the contribution from presiding in an action in which the contributing attorney appears.

The commentator's recommended limit is $1,000. Fla. Stat. §106.08(1)(e) presently imposes a limit of $1,000 on contributions to a campaign for county or circuit court judge.

We respectfully submit that the time may have arrived when our jurisprudence should begin to reflect that we trust nisi prius judges and that we expect the best from them - not

the worst. Blackstone may have overstated the case somewhat for the harsh world in which we live today, but the following excerpt from 3 W. Blackstone, Commentaries 361 bears repeating:

> [T]he law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy censure from those to whom the judge is accountable for his conduct.

We should not suppose that the honor of a circuit judge can be bought for $1,000. We further respectfully adopt Judge Schwartz's eloquent opinion on this point.

III.

APART FROM THE MATTERS ALLEGED IN THE MOTIONS FOR DISQUALIFICATION, THERE EXIST NO ADDITIONAL GROUNDS TO COMPEL THE DISQUALIFICATION OF THE TRIAL JUDGE.

The motion for disqualification in BREAKSTONE was properly denied. The record discloses that after determining that said motion was legally insufficient and after announcing her ruling thereon, the respondent trial judge stated that it was her practice to separate herself from her husband's political activities and to remain unaware of the contributors to his campaign. The question then arises as to whether by uttering these remarks the respondent became subject to coerced disqualification, even though there were no legally sufficient

grounds therefor absent said remarks. We submit that this question must be answered in the negative.

Decisions such as Bundy v. Rudd, 366 So.2d 440 (Fla. 1978); Stimson Computing, etc. v. Knuck, 508 So.2d 482 (Fla. 3d DCA 1987); State ex rel Allen v. Testa, 414 So.2d 38 (Fla. 3d DCA 1982); and Management Corp. of America, Inc. v. Grossman, 396 So.2d 1169 (Fla. 3d DCA 1981), stand for the proposition that in determining a motion for disqualification, a trial judge may not deny or dispute the factual allegations of the motion or otherwise create an adversarial relationship between the movant's counsel and the judge. Such did not occur in the instant case. Here, the respondent trial judge clearly indicated that the motion for disqualification was denied for insufficiency and then stated that she did not know who contributed to her husband's election campaign. It is important to note that this did not constitute a denial of the central factual allegation in the motion that plaintiff's attorney had contributed to the election campaign. (The only other factual allegation was that prior to a hearing, respondent's husband came to see her in her chambers and the attorneys had to wait outside until the visit was completed.) Nor did respondent create an intolerable adversarial atmosphere by her remarks. Any such conclusion is simply not supported by any fair reading of the record. If anything, respondent's remarks should have served to alleviate concerns, not exacerbate them. A motion for disqualification raises a pure question of law with respect to the sufficiency of the facts

alleged, the truth of which is assumed, to create a well-founded fear of bias or prejudice. The question is not whether the judge is biased, but whether the facts alleged are sufficient to create a reasonable fear of bias. Having determined that the facts alleged in a motion for disqualification are insufficient as a matter of law, a judge may nevertheless choose to enter a voluntary recusal. See Parsons v. Motor Homes of America, Inc., 465 So.2d 1285, 1290 (Fla. 1st DCA 1985) (denial of legally insufficient disqualification motion was not reversible error, although preferred course might have been to voluntarily recuse). We submit that in such a situation, where a trial judge denies a legally insufficient motion for disqualification and then determines that voluntary recusal is not required, a brief explanation might not be inappropriate in a proper case and should be held to be distinguished from the Bundy, Stimson Computing lines of cases cited above. Here the respondent did not deny that plaintiff's counsel contributed to the campaign. She correctly held that it was an insufficient ground for disqualification and merely stated that she never looked at the list of contributors. To hold that these brief remarks were sufficient to compel disqualification would place an undue and distorted emphasis on a relatively casual comment and would serve only to inhibit the lively and informal interchange between judge and lawyers which is a central, and we think essential, feature of the search for truth in the trial courts.

CONCLUSION

The certified question should be answered in the negative, the District Court decision should be quashed, and the cause should be remanded with instructions to deny the petition for writ of prohibition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief and appendix was this 26 day of October, 1989, ~~hand delivered~~/mailed to the offices of: BIRGITTA K. SIEGEL, ESQ., 701 Brickell Avenue, Suite 1900, Miami, Florida 33131; ALLAN RUBIN, ESQ., 2404 Hollywood Boulevard, Hollywood, Florida 33020; ROBERT BLACK, ESQ., 420 South Dixie Highway, Suite #2-L, Coral Gables, Florida 33146; WILLIAM J. BERGER, ESQ., 2150 S.W. 13 Avenue, Miami, Florida 33145; FRANK M. MARKS, ESQ., 4500 Biscayne Boulevard, Suite 300, Miami, Florida 33137; and JOSEPH P. KLAPHOLZ, ESQ., 2206 Hollywood Boulevard, Hollywood, Florida 33020.

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